

**Arab Malaysian Corp Builders Sdn Bhd
& Anor v ASM Development Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S2-
24-622 OF 1997

KAMALANATHAN RATNAM JC
6 JANUARY 1998

Civil Procedure — *Injunction* — *Interlocutory injunction to restrain defendant from deducting liquidated and ascertained damages from sums due to plaintiffs* — *Application pending final determination of defendant's entitlement to deduct by arbitration* — *Whether there was a cause of action* — *Whether s 13(6) (h) of the Arbitration Act 1952 refers to interim injunction and not an interlocutory injunction* — *Whether payment of money is specific relief under the Specific Relief Act 1950* — *Whether s 75 of the Contracts Act 1950 renders such deductions illegal* — *Whether granting injunction pre-determining the issue*

Words and Phrases — '*Interim injunction*'

Words and Phrases — '*Interlocutory injunction*'

The defendant had awarded to the plaintiffs a building contract for the construction of eight blocks of six-storey shop offices and one block of a four-storey car park building by way of a letter of award dated 18 January 1995. The material terms of the contract were in the letter of award and the conditions of the contract. The plaintiffs contended that they were not given full and effective possession of the site by the defendant in view of problems relating to the acquisition of the land on part of the site. A clause in the conditions of contract provided that payments shall be made by the defendant to the plaintiffs progressively in accordance with the interim certificates issued by the project architect. Upon presentation of the interim certificates to the defendant pursuant to the terms of the letter of award, the plaintiffs were entitled to payment on the 20th day of each and every month immediately following the presentation of the interim certificates. The period for completion was originally fixed for 18 October 1996. Subsequently, various extensions of time were granted by the architect to the plaintiffs to complete the works. The final extension of time granted by the architect was for the completion by 5 May 1997. On 6 May 1997, the architect certified that in his opinion, practical completion of the works should have been achieved on 5 May 1997. On 23 June 1997, an amount of RM570,000 was deducted from an interim certificate purportedly in respect of liquidated and ascertained damages ('LAD') computed for a period of 38 days at RM15,000 per day. On 4 July 1997 the plaintiffs wrote to the defendant citing, inter alia, that the defendant was not entitled to make the deductions until the final determination by an arbitrator on the defendant's alleged entitlement to make the said deductions. Notwithstanding the plaintiffs' objection to the deductions, the defendant on 24 July 1997

A added a further deduction in the amount of RM495,000. Arbitration proceedings were commenced by the plaintiffs' notice to arbitrate dated 15 May 1997 issued to the defendant. The plaintiffs applied for an injunction to restrain the defendant from deducting LAD from sums certified as due to the plaintiffs pending final determination of the defendant's entitlement to deduct by arbitration.

B

Held, dismissing the application:

C (1) It is trite that any application for an injunction requires the existence of a cause of action. The mere fact that a party can apply for an injunction is in itself not a cause of action. The existence to a right to arbitrate or an intention to arbitrate is not a cause of action. In the present case, the claim in arbitration had not yet been formulated (see p 143D and F); *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 followed.

D

E (2) The plaintiffs relied on s 13(6)(h) of the Arbitration Act 1952 ('the Act') to secure the amount in dispute, even though the plaintiffs' originating summons, neither in the title nor in the body, makes reference to the Act. Section 13(6)(h) of the Act refers to 'interim injunction'. The plaintiffs were no doubt seeking an order for an interlocutory injunction. The principles applicable under s 13(6)(h) of the Act are much narrower and therefore this application ought to be dismissed as the plaintiffs were unsure for how long they intended the injunction to be maintained (see p 144E and H).

E

F

G (3) The sole relief adumbrated in the plaintiff's affidavits and in their submissions relates to the payment of money where the plaintiffs claimed that the defendant wrongfully deducted liquidated damages under the contract. If the deductions were wrongful, it is obvious that this is a claim in debt and the usual remedy for recovery of debt is an action for money. The payment of money is not to be regarded as specific relief under the Specific Relief Act 1950. In other words, the relief provided under this Act is a relief in specie, that is, the performance of a specific act or the delivery of particular articles and not relating to the payment of money (see pp 144I-145A and D).

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I (4) In this case, condition 22 of the conditions of contract clearly provides for 'liquidated and ascertained damages'. The emphasis is on the word 'ascertained', that is the sums the parties had worked out at the time the contract was entered into. The question as to whether s 75 of the Contracts Act 1950 applies in respect of liquidated and ascertained damages in a building contract for construction of buildings already sold to third parties, as in the case here, was an issue that ought to be determined at the full trial (see p 147C-D).

Moreover, s 75 does not declare condition 22 to be illegal. What s 75 attacks is the quantum of the damages specified in a

contract as payable for a breach of contract. That is an issue for the arbitration proceedings and not for this court to decide. Until the arbitrator rules that the defendant is not entitled to LAD of RM15,000 per day, the defendant was entitled to deduct. Until and unless set aside or rectified, the contract was valid and must be performed (see p 147D-E).

- (5) By this application, the plaintiffs were seeking to tie the hands of the arbitrator and to pre-determine the issues before the arbitrator. Since the very issue as to the legality and the propriety of the deduction was before the arbitrator, the granting the injunction sought by the plaintiffs would thwart the course of justice (see p 148H-I).
- (6) Both the plaintiffs and the defendant claimed the sums deducted and retained as the LAD. At the least, the fund or the said sum must be protected or secured. In this case, the defendant had placed the sum in a fixed deposit pending the determination of the arbitration. The defendant had also informed the plaintiffs of that fact and had produced copies of the fixed deposit receipts. Therefore, pending the disposal of the dispute, the court should not direct the money to be paid out but only to secure it so that the moneys would be available should the plaintiffs succeed (see p 149A-C).

Obiter:

There is a clear distinction between 'interim injunction' and 'interlocutory injunction'. An interlocutory injunction is an order to preserve a particular set of circumstances pending full trial of the matters in dispute, while an interim injunction is an order in the nature of an 'interlocutory injunction' but restraining the defendant only until after a named day or further order (usually no more than a few days). Section 13(6)(h) refers to interim injunction and not an interlocutory injunction (see p 144B-E).

[Bahasa Malaysia summary]

Defendan telah memberi plaintif-plaintif satu kontrak binaan untuk pembinaan lapan blok pejabat kedai enam tingkat dan satu blok bangunan tempat meletak kereta setinggi empat tingkat melalui satu surat award bertarikh 18 Januari 1995. Terma-terma material kontrak tersebut terdapat dalam surat award itu dan juga syarat-syarat kontrak tersebut. Plaintif-plaintif menegaskan bahawa mereka tidak diberikan milikan penuh dan berkesan akan tapak tersebut oleh defendan memandangkan masalah berkaitan dengan pengambilan tanah tersebut di bahagian tapak itu. Satu fasal dalam syarat-syarat kontrak tersebut memperuntukan pembayaran-pembayaran akan dibuat oleh defendan kepada plaintif-plaintif secara progres atau bayaran kemajuan menurut sijil-sijil interim yang dikeluarkan oleh arkitek projek tersebut.

- A** Setelah sijil-sijil interim itu dikemukakan kepada defendan selaras dengan terma-terma surat award itu, plaintif-plaintif adalah berhak kepada pembayaran pada hari ke-20 setiap satu bulan segera selepas pengemukakan sijil-sijil interim tersebut. Tempoh untuk penyiapan telah pada asalnya ditetapkan bagi 18 Oktober 1996. Berikutan itu,
- B** beberapa lanjutan masa telah diberikan oleh arkitek tersebut kepada plaintif-plaintif untuk menyiapkan kerja-kerja tersebut. Tempoh lanjutan akhir yang diberikan oleh arkitek tersebut adalah bagi penyiapan selewat-lewatnya pada 5 Mei 1997. Pada 6 Mei 1997, arkitek tersebut telah mengesahkan bahawa menurut pendapatnya, penyiapan praktikal kerja-kerja tersebut seharusnya telah tercapai pada 5 Mei 1997. Pada 23 Jun 1997, satu jumlah sebanyak RM570,000 telah ditolak daripada satu sijil interim yang dikatakan berhubung dengan gantirugi jumlah tertentu dan yang dipastikan ('LAD') yang dihitung bagi tempoh selama 38 hari pada kadar RM15,000 sehari. Pada 4 Julai, plaintif-plaintif telah menulis kepada defendan dengan menyebut, antara lainnya, bahawa defendan tidak berhak membuat potongan tersebut sehingga penentuan oleh seorang penimbangtara mengenai keberhakan defendan yang didakwa untuk membuat potongan tersebut. Meskipun terdapatnya bantahan plaintif-plaintif kepada potongan tersebut, defendan telah pada 24 Julai 1997 menambahkan potongan yang seterusnya dalam jumlah sebanyak RM495,000. Prosiding timbangtara telah dimulakan oleh notis plaintif-plaintif untuk menimbangtara bertarikh 15 Mei 1997 yang dikeluarkan kepada defendan. Plaintif-plaintif telah memohon untuk mendapatkan satu injunksi bagi menghalang defendan dari memotong LAD daripada jumlah-jumlah yang disahkan sebagai kena dibayar kepada plaintif-plaintif tersebut sementara menantikan penentuan muktamad keberhakan defendan untuk memohon melalui timbangtara.
- F**

Diputuskan, menolak permohonan tersebut:

- G** (1) Ianya merupakan perkara biasa bahawa mana-mana permohonan untuk mendapatkan satu injunksi memerlukan kewujudan satu kausa tindakan. Fakta semata bahawa sesuatu pihak boleh memohon untuk mendapatkan satu injunksi adalah dengan sendirinya bukan merupakan satu kausa tindakan. Kewujudan kepada sesuatu hak untuk menimbangtara atau suatu niat untuk menimbangtara bukannya merupakan satu kausa tindakan. Dalam kes semasa, tuntutan dalam timbangtara masih belum dirumuskan (lihat ms 143D dan F); *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* (1990) 2 MLJ 423 diikuti.
- H**
- I** (2) Plaintif-plaintif telah bergantung pada s 13(6)(h) Akta Timbangtara 1952 ('Akta tersebut') untuk menjamin jumlah yang dipertikaikan, walaupun saman pemula plaintif-plaintif tidak, sama ada dalam tajuk mahupun dalam badannya, membuat rujukan kepada Akta tersebut. Seksyen 13(6)(h) Akta tersebut merujuk kepada 'injunksi interim'. Tiada keraguan bahawa

plaintif-plaintif berusaha untuk mendapatkan satu perintah untuk satu injunksi interlokutori. Prinsip-prinsip yang terpakai di bawah s 13(6)(h) Akta tersebut adalah lebih sempit dan dengan itu permohonan ini seharusnya ditolak kerana plaintiff-plaintif tidak pasti bagi tempoh berapa lamakah mereka mahukan injunksi itu dikekalkan (lihat ms 144E dan H).

- (3) Relif tunggal yang dibayangkan dalam affidavit-affidavit plaintiff dan dalam penghujahan-penghujahan mereka berkaitan dengan pembayaran wang di mana plaintiff-plaintif telah menuntut bahawa defendan telah secara salah memotong gantirugi jumlah tertentu di bawah kontrak tersebut. Jika potongan itu salah di sisi undang-undang, ianya jelas bahawa ini adalah tuntutan yang terhutang dan remedi biasa untuk mendapatkan semula hutang adalah suatu tindakan untuk mendapatkan wang. Pembayaran wang tidak seharusnya dianggap sebagai relif spesifik di bawah Akta Relif Spesifik 1950. Dalam ertikata yang lain, relif yang diperuntukan di bawah Akta ini adalah relif dalam specie, iaitu, pelaksanaan sesuatu tindakan spesifik atau penghantar-serahan artikel-artikel yang khusus dan bukannya berhubung dengan pembayaran wang (lihat ms 144I-145A dan D).

- (4) Dalam kes ini, syarat 22 daripada syarat-syarat kontrak tersebut dengan jelasnya memperuntukan 'gantirugi jumlah tertentu dan dipastikan'. Penekanan adalah di atas perkataan 'dipastikan', iaitu jumlah pihak-pihak itu telah kiranya pada waktu kontrak itu dimasuki. Persoalan mengenai sama ada s 75 Akta Kontrak 1950 terpakai berhubung gantirugi jumlah tertentu dan dipastikan dalam sesebuah kontrak binaan untuk pembinaan bangunan-bangunan yang telah pun dijual kepada pihak-pihak ketiga, sepertimana keadaannya di sini, merupakan satu isu yang seharusnya ditentukan di perbicaraan penuh (lihat ms 147C-D).

Lagipun, s 75 tidak mengisytiharkan syarat 22 sebagai tak sah di sisi undang-undang. Apa yang diserang oleh s 75 adalah kuantum gantirugi yang ditentukan dalam kontrak tersebut secara kena dibayar bagi kemungkiran kontrak. Itu merupakan isu untuk prosiding timbangtara dan bukannya untuk diputuskan oleh mahkamah ini. Sehingga pihak timbangtara memutuskan bahawa defendan tidak berhak kepada LAD sebanyak RM15,000 sehari, defendan adalah berhak untuk membuat potongan. Sehingga dan jikalau ia diketepikan atau diperbaiki, kontrak tersebut adalah sah dan semestinya dilaksanakan (lihat ms 147D-E).

- (5) Dengan permohonan ini, plaintiff-plaintif cuba untuk menyekat penimbangtara dan untuk menentukan lebih awal isu-isu tersebut di hadapan penimbangtara. Oleh kerana isu penting mengenai keesahan dan kesusilaan potongan tersebut berada di hadapan penimbangtara, pemberian injunksi yang dipohon oleh plaintiff-plaintif akan menghalang perjalanan keadilan (lihat ms 148H-I).

- A** (6) Kedua-duanya plaintif-plaintif dan defendan menuntut jumlah yang dipotong dan dikekalkan sebagai LAD. Sekurang-kurangnya, dana atau jumlah tersebut mestilah dilindungi atau dijamin. Dalam kes ini, Defendan telah meletakkan jumlah itu ke dalam simpanan tetap sementara menantikan penentuan timbangtara tersebut. Defendan telah juga memaklumkan plaintif-plaintif mengenai fakta itu dan telah mengemukakan salinan-salinan resit simpanan tetap tersebut. Dengan itu, sementara menantikan pelupusan pertikaian itu, mahkamah tidak seharusnya mengarahkan wang tersebut dibayar keluar tetapi hanya menjamin supaya wang itu akan ada tersedia sekiranya plaintif-plaintif berjaya (lihat ms 149A–C).
- B**
- C**

Obiter:

- D** Terdapat perbezaan yang jelas antara “injunksi interrim” dan injunksi interlokutori”. Sesuatu injunksi interlokutori adalah suatu perintah untuk mengekalkan sesuatu set keadaan sementara menantiikan perbicaraan penuh perkara yang dipertikaikan itu, sementara sesuatu injunksi interim adalah perintah yang bersifat “injunksi interlokutori” tetapi menghalang defendan hanya sehingga satu hari yang dinamakan atau perintah selanjutnya (selalu tidak lebih daripada beberapa hari).
- E** Seksyen 13(6)(h) merujuk kepada injunksi interim dan bukannya satu injunksi interlokutori. (lihat ms 144B–E).

Notes

- F** For cases on interlocutory injunctions, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2118–2235.

Cases referred to

- Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 (refd)
- G** *Cheow Chew Khooon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457(refd)
- Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 (folld)
- Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559 (refd)
- H** *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 (folld)
- Rimbunan Hijau Sdn Bhd v Sarawak Plywood (M) Sdn Bhd* [1985] 2 MLJ 377 (refd)
- I** *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 2 AMR 1097 (refd)

Legislation referred to

Arbitration Act 1952 s 13, 13(6), 13(6)(f), (h)
Specific Relief Act 1950 s 20(1)

K Anantham (M Sanjay and Ivan Loo with him) (Skrine & Co) for the plaintiffs.

RR Sethu (RR Sethu) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC:*The application*

This is the plaintiffs' application for an injunction to restrain the defendant, whether by itself, its servants and/or agents or otherwise from deducting liquidated and ascertained damages ('LAD') from sums certified as due to the plaintiffs, under the terms and conditions of the agreement to design, construct and complete 90 units of shops/offices with car park and infrastructure works on part of Lot PT 2241 Section 71, Pekan Sungai Besi and PT 3824 Mukim Petaling, Kuala Lumpur until the final determination of the defendant's entitlement to deduct has been ascertained by arbitration.

The facts and matters in dispute

The defendant had awarded to the plaintiffs a building contract for the construction of eight blocks of six-storey shop offices and one block of a four-storey car park building at Bandar Tasik Selatan by way of a letter of award dated 18 January 1995. The material terms of the contract are in the said letter of award and in the conditions of contract. The plaintiffs, although entering the site on 19 April 1995, contended that they were not given full and effective possession of the site by the defendant in view of certain problems relating to the acquisition of land on part of the site. Clause 30 of the conditions of contract provides that payments shall be made by the defendant to the plaintiffs progressively in accordance with interim certificates issued by the project architect. The plaintiffs, upon presentation of the interim certificates to the defendant pursuant to the terms of the letter of award, were entitled to payment on the 20th day of each and every month immediately following the presentation of the interim certificates. The period for completion of the works was originally fixed for 18 October 1996. Subsequently, various extensions of time were given by the architect to the plaintiffs to complete the works. The final extension of time granted by the architect was for completion by 5 May 1997. On 6 May 1997, the architect certified that in his opinion, practical completion of the works should have been achieved on 5 May 1997 and that the plaintiffs had therefore delayed in completing the said works. The plaintiffs, on the other hand, contended that the defendant had failed to

- A honour interim certificates issued by the architect within the stipulated period under the contract. On 23 June 1997, an amount of RM570,000 was deducted from Interim Certificate No 26 purportedly in respect of LAD computed for a period of 38 days at RM15,000 per day. On 4 July 1997, the plaintiffs wrote to the defendant citing, inter alia, that the defendant was not entitled to make the aforesaid deductions and requested the defendant to refrain from making the deductions until the final determination by an arbitrator on the defendant's alleged entitlement to make the said deductions. The plaintiffs further contended that such deductions would hamper the progress of the plaintiffs' works due to its adverse effects on the plaintiffs' cash flow situation. Notwithstanding the plaintiffs' objection to the said deductions, the defendant on 24 July 1997 made a further deduction in the amount of RM495,000 from Interim Certificate No 27. This deduction was also disputed by the plaintiffs. Arbitration proceedings commenced by the plaintiffs' notice to arbitrate dated 15 May 1997 issued to the defendant.

D *Injunction to be anchored to a cause of action*

- The present application, no doubt, seeks an interlocutory injunction pending the arbitration. It is trite that any application for an injunction requires the existence of a cause of action. The mere fact that a party can apply for an injunction is in itself not a cause of action. In *Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423, Zakaria Yatim J (as he then was) said at p 424:

Since a trial is envisaged the plaintiff must show that he has a cause of action. The grant or refusal of an interlocutory injunction therefore depends on whether there is a cause of action.

- F It is my judgment that this same principle applied by Zakaria Yatim J to an action filed in court applies equally to arbitration proceedings. The existence of a right to arbitrate or of an intention to arbitrate is not a cause of action. The claim in the arbitration has not as yet been formulated or at least is not in evidence before me.

G *Issue of jurisdiction*

- H The plaintiffs are relying on the provisions of the Arbitration Act 1952 ('the Act') even though the plaintiffs' originating summons neither in the title nor in the body makes reference to the Act. There is, however, a reference to the Rules of the High Court 1980 ('the RHC'). In *Cheow Chew Khoo (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457, Gopal Sri Ram JCA said at p 477:

- I It is my opinion that an originating process requiring an intitlement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved: otherwise, it would be an embarrassing pleading and it may be liable to be struck out, unless sooner amended.

From their submission, I gather that the plaintiffs were relying on s 13(6) of the Act. Section 13(6)(f) of the Act — that is, to secure the amount in dispute — is not being invoked in the present case. Instead, the plaintiffs are relying on s 13(6)(h) which deals with the power of this court to grant interim injunctions.

Interim injunction and interlocutory injunction

I am of the view that there is a clear distinction between ‘interim injunction’ and ‘interlocutory injunction’. In *Commercial Litigation: Pre-Emptive Remedies* (3rd Ed), the learned author says this at p 50:

1 Interlocutory injunctions and interim injunctions

These phrases are often used interchangeably. However, they may be interpreted thus:

- (a) Interlocutory injunction: An order to preserve a particular set of circumstances pending full trial of the matters in dispute.
- (b) Interim injunction: An order in the nature of an ‘interlocutory injunction’ but restraining the defendant only until after a named day or further order (usually no more than a few days). Such an injunction remains in force until a named day, the order (for example) running thus: ‘Until 10.30 am on Wednesday 10 August or so soon thereafter as counsel may be heard’.

There is a dearth of authority on this issue and I am inclined to accept the views expressed by the learned author. I cannot, especially in this case, ignore this distinction since s 13(6)(h) refers to ‘interim injunction’. However, from the tenor and tone of the application and based on the fact that the plaintiffs had proceeded pursuant to O 29 of the RHC, the plaintiffs are no doubt seeking an order for an interlocutory injunction. I am of the view that the principles applicable under s 13(6)(h) of the Act are much narrower. In *Rimbunan Hijau Sdn Bhd v Sarawak Plywood (M) Sdn Bhd* [1985] 2 MLJ 377, Syed Agil Barakbah SCJ said at pp 379–380:

... Section 13(6)(h) of the Arbitration Act 1952 (‘the Act’) empowers the High Court to grant an interim injunction or to appoint a receiver in a proper case and it was under this statutory provision of the Act that the appellants were asking the learned judge to exercise his jurisdiction, pending the determination of the disputes of the parties by arbitration. Since the appointment of an arbitrator had been made, we are of the opinion that in the exercise of his discretionary statutory power under s 13(6)(h) of the Act the main consideration of the court is whether or not the status quo ought to be preserved. In such a case like the present, the principles enunciated by Lord Diplock in *American Cyanamid’s* case does not apply to such an application. We do not think that Lord Diplock had this sort of application in mind when he stated his principles in such wide terms.

On this ground too, I ought to dismiss this application as the plaintiffs are unsure for how long they intend the injunction to be maintained.

A *Claim in debt*

The sole relief adumbrated in the plaintiffs' affidavits and in their submissions relates to the payment of money. Even in the arbitration proceedings, the issue relates to the sum of money due. The plaintiffs claim that the defendant wrongfully deducted liquidated damages under the contract. If the deductions are wrongful, it is obvious that this is a claim in debt and the usual remedy for recovery of a debt is an action for money. This of course raises the perennial question as to whether the plaintiffs can get specific performance or an injunction for the performance of money obligation. I therefore have to consider the Specific Relief Act 1950 ('the SRA').

The Specific Relief Act 1950

There are certain basic principles to be remembered, namely:

- D**
- (1) An interlocutory injunction cannot be obtained unless there will be a permanent injunction.
 - (2) Non-payment of a debt cannot be the subject of an injunction because damages can constitute an adequate remedy.

E It is my judgment that the payment of money is not to be regarded as specific relief under the SRA. In other words, the relief provided under this Act is a relief in specie, that is, the performance of a specific act or the delivery of particular articles and not relating to the payment of money, unless of course the contract is for the delivery up of particular or specific coins. In this context, s 20(1) of the SRA which states:

- F** (a) a contract for the non-performance of which compensation in money is an adequate relief;

is very pertinent. A claim for money is not specifically enforceable. Where an injunction is sought in respect of an obligation that 'arises from contract', the court must be guided by Ch II of the SRA and it is noteworthy that s 20(1) is found in Ch II of the SRA. And s 54(f) of the SRA disallows the grant of an injunction to prevent a breach of a contract that is not specifically enforceable. In *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408, Hashim Yeop A Sani CJ said at p 409:

H The respondents in their counterclaim sought for the return of the \$90,000 as the sum allegedly paid towards the purchase of the machine and damages and interest. It is clear therefore that this is a case where, even holding the defendants to their counterclaim, damages would be an adequate remedy. Therefore, the injunction was in our view not properly granted. In a case like this, it would be more appropriate to order an early hearing of the application to strike out the counterclaim and the application for summary judgment rather than to grant the injunction.

I

The contractual documents

The contracts are constituted by the various documents recited in the letter of award dated 18 January 1995 and the Finance Agreement also dated 18 January 1995. It is trite that for the purposes of these proceedings, I need to look at these documents 'on their face value' to help 'tip the balance one way or another' as said in *Associated Tractors*' case. The regulatory terms are set out in the conditions of contract, namely a provision for damages for non-completion (cl 22) and a provision for extension of time on various grounds (cl 23). However, the earlier provision seems to have been deleted from the conditions. On the same day, the contract was entered into, the parties had agreed to 'Supplementary Conditions' which were to prevail over the printed conditions of contract. On the issue of delay, the supplementary conditions included a term to provide for a construction programme to meet the completion date. On extension of time, the printed conditions 23(d)–(i) were omitted and a new (k) was added to the supplementary conditions. It is apparent that the effect of the omission was that the provisions omitted do not form part of the conditions of contract.

A further twist to this episode was provided by a further letter dated 22 February 1994 affecting the contract between the parties. By this letter, it was provided that all provisions as to the extension of time in the supplementary conditions were deleted. However, this letter was silent and did not provide for the restoration of the earlier omission in the printed conditions of contract. I am guided by the decision of Anuar J (as he then was) in *Kuala Lumpur Landmark Sdn Bhd v Standard Chartered Bank* [1994] 2 MLJ 559 when he said at pp 569–570:

In *Supermarl Ltd v Federated Homes Ltd* 9 Const LR 25, it was held that where there is a valid compromise agreement about claims, breach of its terms does not revive the original claims.

Having very carefully read and re-read the redemption agreement, I can find nothing that has reserved unto the defendant bank the right to pursue the foreclosure proceedings to the hilt in the event of the plaintiff failing, for any reason, to fulfil its obligation. Indeed, the opening words of cl 5 are: 'For the avoidance of ambiguity', which go to show that the parties were intent on making it absolutely clear what they meant to have between them under the agreement.

In the circumstances, it is my judgment that the redemption agreement replaced the charges recited in it and once it was entered into, the effect was to denude those charges of any legal effect.

It is my finding that there was no agreement to restore the printed conditions as previously stood. The plaintiffs' complaint thus began with the architect's refusal to grant extension of time.

How extension of time was sought

The plaintiffs sought an extension of time retrospectively for 120 days from 1 August 1995 to 30 November 1995 by their letter dated 21 March

- A** 1996. By his letter dated 7 October 1996, the architect provided extension till 15 February 1997. Subsequently by its letter dated 19 December 1996, the first plaintiff alleged that there was an agreement by the defendant to grant an extension of time till 30 June 1997. The defendant promptly denied this by its letter, the very next day. There was no further response to that denial by the plaintiffs. The plaintiffs then sought an extension relying on conditions 23(h) and (f) of the printed conditions, all of which were no longer a part of the contract by reason of the deletions under the Supplementary Conditions. Nevertheless, the architect granted an extension till 16 April 1997. The plaintiffs made further application for extension and the architect granted an extension till 5 May 1997 which for the present purposes was the final date. All extensions granted were less than for the period sought by the plaintiffs. There was no reference to arbitration then in respect of these extensions for shorter periods. The plaintiffs had given no reason why they did not invoke arbitration at the time when the architect refused the extension. Consequently, the practical completion date remained as 5 May 1997 and it is my judgment, on the facts available, that liquidated ascertained damages ran from 6 May 1997.
- B**
- C**
- D**

Section 75 of the Contracts Act 1950

- E** In this case, condition 22 of the Conditions of Contract clearly provides for 'liquidated and ascertained damages'. The emphasis is on the word 'ascertained', that is the sum that the parties had worked out at the time the contract was entered into. The question as to whether s 75 applies in respect of liquidated and ascertained damages in a building contract for construction of buildings already sold to third parties, as is the case here, is an issue that ought to be determined at the full trial of this case. In my view, s 75 of the Contracts Act does not declare condition 22 to be illegal. What s 75 attacks is the quantum of the damages specified in a contract as payable for a breach of contract. This is an issue for the arbitration proceedings and not for this court to decide. Until the arbitrator rules that the defendant is not entitled to LAD at RM15,000 per day, the defendant is entitled to deduct. In my judgment, until and unless set aside or rectified, the contract is valid and must be performed. For these reasons, the plaintiffs' reliance on *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 2 AMR 1097 is flawed.
- F**
- G**

The architect's refusal of extension

- H** The plaintiffs' real complaint is against the architect's refusal of extension. If the architect was wrong in refusing the grant of extension, then there is no basis for the deduction of the LAD under condition 22. The plaintiffs have not addressed this issue. So long as the architect's decision stands, the defendant is entitled to invoke condition 22 and deduct the LAD. It is my judgment that whether the architect was right or wrong is a matter for the arbitrator to decide.
- I**

Did time cease to be the essence?

The plaintiffs claim that time ceased to be the essence. This is not so because the plaintiffs themselves realized that time was of the essence when they repeatedly made requests for extensions. In any case, I hold that even if time were at large (which I find is not so in this case) the defendant can impose time which the architect did. In fact, s 56 of the Contracts Act 1950 specifically provides for it and once a new time is fixed, time remains of the essence.

The right of deduction

The plaintiffs are seeking payment in breach of the contract and the present injunction is sought not to enforce, but to prevent the exercise of contractual rights. In my view, the defendant is entitled to deduct under the contract.

Question of cash flow being affected

The plaintiffs complained that the right to deduct should not be allowed because it interfered with the cash flow. On the issue of cash flow being affected, the House of Lords said through the judgment of Lord Diplock in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195 at pp 215–216:

My Lords, I accept the importance of ‘cash flow’ in the building industry. In the vivid phrase of Lord Denning MR, ‘it is the very lifeblood of the enterprise’. But so it is of all commercial enterprises engaged in the business of selling goods or undertaking work or labour; and so it was in the first half of the nineteenth century when this common law remedy for breach of warranty was ‘established’ and in 1893 when its application to contracts for sale of goods received statutory recognition in the Sale of Goods Act. ‘Cash flow’ is the lifeblood of the village grocer too, though he may not need so large a transfusion from his customers as the shipbuilder in *Mondel v Steel* (1841) 8 M & W 858 or the sub-contractor in the instant appeal. It is also the lifeblood of the contractor whose own cash flow has been reduced by the expense to which he has been put by the sub-contractor’s breaches of contract. It is not to be supposed that so elementary an economic proposition as the need for cash flow in business enterprises escaped the attention of judges throughout the 130 years which had elapsed between *Mondel v Steel* and *Dawnay’s* case [1971] 2 All ER 1389; [1971] 1 WLR 1205 in 1971, or of the legislature itself when it passed the Sale of Goods Act in 1893.

In the circumstances, it is my judgment that the issue of cash flow cannot form the hamstring of the plaintiffs’ case.

Effect of the injunction

To my mind the granting of this injunction is akin to pre-determining the issue. The plaintiffs are, by this application, seeking to tie the hands of the arbitrator and to pre-determine the issues before the arbitrator. If I grant this injunction, it would have the effect of enabling the plaintiffs to submit

- A** to the arbitrator that the grant of the injunction for payment over of the sums deducted would have in effect decided the issue, and the arbitrator being an inferior tribunal, would have to be bound by that decision. Since the very issue as to the legality and the propriety of the deduction and the refusal of the extension of time are before the arbitrator, I am firmly of the view that granting the injunction sought by the plaintiffs would thwart the course of justice.
- B**

Need to secure the amount deducted

- C** Both the plaintiffs and the defendant claim the sums deducted and retained as the LAD. At the least, the fund or the said sum must be protected or secured. In any case, the said fund is in the hands of the defendant because it exercised its contractual right. It is to be observed that the defendant had placed the said sum or fund in a fixed deposit pending the determination of the arbitration. The defendant has also informed the plaintiffs of that fact and has produced copies of the fixed deposit receipts. It is therefore
- D** my judgment that pending the disposal of the dispute, this court should not direct the money to be paid out but only to secure it so that the moneys will be available should the plaintiffs succeed. The defendant has done this voluntarily and without the intervention of the court. I accept that as prudent conduct on the part of the defendant. The purpose is to see that
- E** the plaintiffs' position is not worsened between the date of the application and the date of the final judgment. The conduct of the defendant ought to be applauded; on the other hand there is the clear and unequivocal admission of the plaintiffs that they are having cash flow problems with a dire need for the money.

- F** Having considered the submissions and all the authorities of both the parties, I was constrained to dismiss the plaintiffs' application with costs.

Application dismissed.

Reported by Eugene Lee

G

H

I